STATE OF MINNESOTA
IN COURT OF APPEALS
A11-305

In re the Marriage of: Alesha Yvonne Johnson, petitioner,
Respondent,

vs.

Joseph John Johnson,
Appellant.

Filed November 7, 2011
Affirmed
Stauber, Judge

St. Louis County District Court
File No. 69VIFA0646

Richard E. Prebich, Rachel C. Delich-Sullivan, Law Offices of Richard E. Prebich, Hibbing, Minnesota (for respondent)

Ellen E. Tholen, Ellen E. Tholen Law Office, Bovey, Minnesota (for appellant)

Considered and decided by Stauber, Presiding Judge; Wright, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

STAUBER, Judge

On appeal in this parenting-time dispute, appellant-father argues that the district court abused its discretion by modifying the parties' parenting-time schedule to provide the parties with equal parenting. We affirm.

FACTS

The marriage between appellant Joseph John Johnson and respondent Alesha Yvonne Johnson was dissolved in October 2006. The judgment and decree awarded the parties joint legal and joint physical custody of their three minor children. Shortly thereafter, the district court issued an ex parte order finding that respondent was involved with controlled substances and granted appellant sole legal and physical custody of the minor children, restricting respondent's parenting time to supervised visitation.

After the ex parte order was issued, respondent addressed her issues with controlled substances and her parenting time gradually increased until she was eventually granted unsupervised parenting time. Nonetheless, appellant sought permanent custody of the minor children, and an evidentiary hearing was scheduled for January 25, 2008. At the hearing, the parties placed a stipulated agreement on the record. The court then ordered the parties to provide a written order based on the record. The parties were unable to agree on the written terms of the order so the district court issued an order on November 26, 2008, finding that "[t]he parties agreed they shall continue to share joint legal and joint physical custody of the minor children subject to the schedule sworn, placed on the record, and Ordered below."

In March 2009, respondent moved for an order requesting modification of parenting time and modification of joint physical custody. The district court denied the motion, finding that respondent had not met her burden under Minn. Stat. § 518.18 (2010) to change the parenting-time schedule. A year-and-a-half later, respondent moved for an order modifying the parenting time to a week-on, week-off schedule. Appellant

opposed respondent's motion, but requested that "if the Court is going to entertain a modification of the parenting time schedule as requested by [respondent], that an evidentiary hearing be held prior to a final determination by the Court."

On January 14, 2011, the district court issued its order concluding that respondent's "request to increase parenting time by 4 days per month is not substantial, does not constitute a restriction, is not punitive, but does promote parental contact with each parent, not just one." Thus, the court concluded that because the requested modification was not substantial, an evidentiary hearing was not necessary. The court also concluded that "equal parenting time is in the best interest of [the parties'] children." Therefore, the district court granted respondent's "request for a modification of parenting time to a week-on and week-off parenting time schedule" and denied appellant's requests. This appeal followed.

D E C I S I O N

The district court has broad discretion in deciding parenting-time questions based on the best interests of the child and will not be reversed absent an abuse of discretion. *Olson v. Olson*, 534 N.W.2d 547, 550 (Minn. 1995). "A district court abuses [its] discretion [regarding parenting time] by making findings unsupported by the evidence or improperly applying the law." *Hagen v. Schirmers*, 783 N.W.2d 212, 215 (Minn. App. 2010) (citing *Pikula v. Pikula*, 374 N.W.2d 705, 710 (Minn. 1985)). Findings of fact on which a parenting-time decision is based will be upheld unless they are clearly erroneous. *Griffin v. Van Griffin*, 267 N.W.2d 733, 735 (Minn. 1978). But "[d]etermining the legal

standard applicable to a change in parenting time is a question of law and is subject to de novo review." *Dahl v. Dahl*, 765 N.W.2d 118, 123 (Minn. App. 2009).

I. Minn. Stat. § 518.18 vs. Minn. Stat. § 518.175

Minnesota law requires district courts to "grant such parenting time on behalf of the child and a parent as will enable the child and the parent to maintain a child to parent relationship that will be in the best interests of the child." Minn. Stat. § 518.175, subd. 1(a) (2010). Subdivision 5 of the statute provides that "[i]f modification would serve the best interests of the child, the court shall modify . . . an order granting or denying parenting time, if the modification would not change the child's primary residence." Minn. Stat. § 518.175, subd. 5 (2010). The statute further provides that a court may not restrict parenting time unless it finds that "(1) parenting time is likely to endanger the child's physical or emotional health or impair the child's emotional development; or (2) the parent has chronically and unreasonably failed to comply with court-ordered parenting time." *Id.*

Conversely, Minn. Stat. § 518.18 expressly governs modifications of a "custody order or parenting plan." A custody order includes provisions regarding a child's legal custody, physical custody and residence, and support. Minn. Stat. § 518.17, subd. 3 (2010). A "parenting plan" includes the following: "(1) a schedule of the time each parent spends with the child; (2) a designation of decision-making responsibilities regarding the child; and (3) a method of dispute resolution." Minn. Stat. § 518.1705, subd. 2 (2010). If a motion for modification of a custody order or parenting plan "has been heard, whether or not it was granted, unless agreed to in writing by the parties no

subsequent motion may be filed within two years after disposition of the prior motion on its merits." Minn. Stat. § 518.18(b).

Appellant argues that respondent's motion to modify the parties' parenting time was actually a motion to modify custody under section 518.18. Thus, appellant contends that because respondent's motion, filed in September 2010, was brought less than two years after the district court denied respondent's March 2009 motion to modify the parties' joint physical custody arrangement, the September 2010 motion is time-barred under Minn. Stat. § 518.18(b).

Appellant's argument is without merit. The original judgment and decree awarded the parties joint physical and legal custody of the parties' minor children. At the time of respondent's motion to modify parenting time, the parties' stipulated parenting-time schedule consisted generally of a three-day-on-and-three-day-off schedule. The schedule also contained several other specifications and provided appellant with slightly more parenting-time than respondent. Respondent's motion requested that her parenting time be increased to a week-on, week-off basis. Such a parenting-time schedule would provide the parties with equal parenting time and would be consistent with the original judgment and decree that awarded the parties joint physical and legal custody of the parties' minor children. Respondent's motion did not request a change to the children's legal custody, physical custody, residence, or support. *See* Minn. Stat. § 518.17, subd. 3. Thus, we conclude that respondent did not move to modify custody.

Appellant also argues that Minn. Stat. § 518.18 is applicable because the order dated March 22, 2010, referred to the parties' parenting-time schedule as a "parenting

plan." We disagree. As the district court found, the reference to the parenting-time schedule as a parenting plan appears to be a mistake because although the November 26, 2008 order setting forth the parenting-time schedule contains some elements of a parenting plan, it does not contain all of the elements. Specifically, a review of the November 26, 2008 order reveals that the order set forth a schedule of the time each parent spends with the children and includes a method of dispute resolution. But the order does not designate decision-making responsibilities regarding the children. Moreover, a parenting plan is created (1) upon the request of both parents or (2) by a court "on its own motion" in certain instances. Minn. Stat. § 518.1705, subd. 3(b) (2010). Here, neither the parties nor the district court created a "parenting plan" as contemplated by section 518.1705. As the district court found, the parenting-time schedule was never "formally incorporated as a parenting plan by motion of the Court or as part of the November 26, 2008 Order." Therefore, because the parenting-time schedule does not constitute a "parenting plan," Minn. Stat. § 518.18 does not govern respondent's motion, and respondent's motion is not untimely.

II. Restriction

Under Minn. Stat. § 518.175, subd. 5(1), a district court may restrict parenting time if parenting time is likely to endanger or impair the child's physical or emotional health, and the restriction is in the child's best interests.

Appellant argues that respondent's motion to modify the parties' parenting time amounts to a restriction of his parenting time because the modification substantially reduces his parenting time. Appellant argues that because a restriction of parenting time

requires a finding of endangerment under section 518.175, subdivision 5(1), and there were no allegations or findings of endangerment made, the district court erred by granting respondent's motion to modify the parties' parenting time.

A reduction in parenting time is not necessarily a restriction in parenting time. *Dahl*, 765 N.W.2d at 123. A restriction occurs when a change to parenting time is "substantial." *Matson v. Matson*, 638 N.W.2d 462, 468 (Minn. App. 2002). Modifications are "less substantial" changes in parenting time. *Lutzi v. Lutzi*, 485 N.W.2d 311, 315 (Minn. App. 1992).

To determine whether a change in parenting time is a restriction, the reviewing court must first "identify the order that establishes the baseline parenting-time schedule." *Dahl*, 765 N.W.2d at 123. The baseline is generally found in "the last permanent and final order setting parenting time." *Id.*

Here, the last permanent and final order setting parenting time was the November 26, 2008 order. The order set forth the parenting-time schedule as follows:

> For the first week of the month, [appellant] shall have the children from Sunday at 2:00 p.m. through Wednesday at 2:00 p.m. and [respondent] shall have the children from Wednesday at 2:00 p.m. through Saturday at 2:00 p.m.
>
> For the second week of the month, [appellant] shall have the children from Saturday at 2:00 p.m. through Wednesday at 2:00 p.m. and [respondent] shall have the children from Thursday at 2:00 p.m. through Sunday at 2:00 p.m.
>
> For the third week of the month, [appellant] shall have the children from Sunday at 2:00 p.m. through Wednesday at 2:00 p.m. and [respondent] shall have the children from Wednesday at 2:00 p.m. through Saturday at 2:00 p.m.

> For the last week of the month, [appellant] shall have the children on Sunday, Monday, Tuesday, Thursday, Friday, and Saturday, and [respondent] shall have the children one (1) day overnight (Wednesday at 2:00 p.m. to Thursday at 2:00 p.m.) and so on.

The order further provides that: "During the summer months, the parties shall follow a three (3) days on and three (3) days off schedule commencing the last day of school with the party having the last day of school starting the schedule."

Based upon the parties' parenting-time schedule, appellant has a few more days of parenting time per month during the school year than respondent. Appellant claims that the parenting-time schedule provides him with 63 days of parenting time per year more than respondent. Conversely, respondent claims that appellant has only 23 more days of parenting time per year than she does.

The district court found that appellant had 36 more days of parenting time per year than respondent. In making this finding, the court found that the parties "share equal parenting time in the summer months" leaving appellant with only nine months in which he had more parenting time than respondent. The district court also found that appellant had about four more days of parenting time than respondent during the nine-month school year, which, multiplied over the nine-month period, equaled 36 more days of parenting time per year. The district court's finding that appellant had four more days of parenting time than respondent per month during the nine-month school year was based upon its review of the parenting-time schedule and the submissions of the parties. The district court implicitly found respondent's submissions to be more credible than appellant's. Because the district court found the evidence submitted by respondent to be

more credible, and this court defers to the district court's ability to weigh the evidence and make credibility determinations, we conclude that the court's finding that appellant had 36 more days of parenting time per year than respondent is supported by the record. *See Haefele v. Haefele*, 621 N.W.2d 758, 763 (Minn. App. 2001) (stating that the district court is in the best position to weigh the evidence, and appellate courts defer to its credibility determinations), *review denied* (Minn. Feb. 21, 2001).

Appellant argues that a decrease in parenting time of 36 days per year constitutes a substantial change in parenting time. On this record, we disagree. To determine if parenting time is restricted, the reviewing court looks "at both the reasons for the change and the amount of reduction of the parenting-time rights." *Matson*, 638 N.W.2d at 468. This court has previously concluded that parenting time was restricted when there was a slow erosion of parenting time from 14 weeks per year to five-and-one-half weeks per year, *Clark v. Clark*, 346 N.W.2d 383, 385-86 (Minn. App. 1984), *review denied* (Minn. June 12, 1984), and when parents went from equal time to one parent having the child for nine months of the year, *Lutzi*, 485 N.W.2d at 315. By contrast, this court concluded a change was insubstantial where it was caused by a move to a different state and when, excluding time the children were sleeping or in school, the parents were left with nearly equal parenting time. *Anderson v. Archer*, 510 N.W.2d 1, 4-5 (Minn. App. 1993).

Here, we acknowledge that to a parent, any reduction in parenting time may seem substantial. But the parties were awarded joint legal and joint physical custody of the children. And, in light of a 365-day calendar year, it is reasonable to conclude that a decrease of 36 days over the course of a year is not substantial. Therefore, considering

the totality of the circumstances presented here, we conclude that the modification of the parties' parenting time does not constitute a restriction of appellant's parenting time.

III. Best interests

Appellant further argues that the evidence in the record does not support the district court's decision that modification of the parties' parenting time is in the children's best interests. But as set forth above, the previous parenting-time schedule was convoluted and did not clearly allocate the parties' parenting time. The record reflects that the lack of clarity resulted in parties constantly "bickering" over parenting time. The week-on, week-off modification will bring stability to the parenting-time issue, provide the parties with equal parenting time, and presumably eliminate most, if not all, of the "bickering" over parenting time because the modified parenting schedule provides the parties with a regimented and specific schedule. Any reduction in tension between the parties over parenting time would have a positive impact on the children.

Also, evidence in the record indicates that when the children are with appellant, the children spend a great deal of time with other care-providers. An equal allocation of parenting time would enable the children to spend more time with a parent and less time with another care giver. Moreover, the record reflects that respondent has rehabilitated herself and is involved with the children's school and recreational activities. Thus, a schedule permitting the children to spent more time with their mother and less time with another care giver, while not substantially decreasing appellant's parenting time, would be in the children's best interests.

Finally, the record reflects that the children are well adjusted to their school, their community, and both parties' homes. The parties live relatively close to each other and there is nothing in the record to indicate that equal parenting time would have a detrimental effect on the children's lives. Accordingly, the district court did not abuse its discretion by concluding that the modification of parenting time was in the children's best interests.

IV. Evidentiary hearing

Appellant argues that the district court erred by failing to conduct an evidentiary hearing on the modification issue. But only when a modification of parenting time is substantial is an evidentiary hearing required. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). Insubstantial modifications of parenting time do not require an evidentiary hearing if they serve in the child's best interests. *Id.* As addressed above, the modification of parenting time was not substantial. Therefore, an evidentiary hearing was not necessary.

Affirmed.